No. 12873

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE PLOMB TOOL COMPANY, a corporation,

Appellant,

vs.

LIONEL H. SANGER,

Appellee.

BRIEF OF UNITED STATES, AMICUS CURIAE.

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Introduction.

This brief of the United States as *amicus curiae* is filed because this appeal raises two questions of importance in the performance of the respective duties of the United States Attorneys and the Department of Labor in assisting veterans as provided in Section 8(e) of the Selective Training and Service Act of 1950, 50 U. S. C. App. 308. Argument is confined to those two questions.

Jurisdiction.

Jurisdiction of this court is properly set forth in appellant's opening brief and is not repeated here.

Statement of the Case.

Appellant's and appellee's statements of the case, taken together, are accurate and are not repeated here.

Summary of Argument.

I.

State Statutes of Limitation Do Not Apply to an Action for Reinstatement, With or Without Damages Incidental to Refusal to Reinstate, Because It Is Exclusively Equitable.

The veteran's right of reinstatement is the principal subject of the Act. Only by placing him in his former position if he desires it can the Act be made effective. Court action to do so necessarily requires the exercise of equitable power to compel affirmative conduct. The action, being exclusively equitable in character, is not governed by State statutes of limitation. (*Holmberg v. Armbrecht,* 327 U. S. 392.) The Federal Rules of Decision Act does not require the application of such State rules to actions for reemployment.

II.

The Finding of the Trial Court That Laches Does Not Exist in This Case Should Be Sustained.

A. There Was No Delay in 1946.

In the exercise of its equitable discretion, the court below found that laches did not exist, that appellant contributed to the delay and that the delay did not prejudice appellant. These findings are fully supported by the facts in the case, and reasonable inferences from well-known government procedures. Such facts and inferences amply demonstrate that there was no unreasonable delay

in 1946. No damages were awarded for any later period, and appellant cannot have been prejudiced by any delays after 1946. Delay is therefore no bar to the award of damages for 1946.

B. Veterans' Claims Are Not Barred by Laches Where the Delay Is in the Government's Action in Assisting the Veterans.

Delays subsequent to 1946 and through February 1948 were the result of the acts of public officials in assisting the veteran to assert his claim. Such assistance is rendered pursuant to requirements of the Act. Delays occurring therein are not within the control of the veteran, nor very often in the control of the officials themselves. Diligence cannot usually cure such delays, and the veteran is not to be held responsible for them. In this case, the delay resulted first from the public policy requiring United States Attorneys to aid veterans, and second, from changes and developments in the channels through which assistance to veterans was provided. To charge the veteran with such certain and unavoidable delay would deprive him of the very assistance the Act confers. There is no undue burden placed on the employer if such delays are held not culpable, and the veteran's burden would be wholly disproportionate if they were. The lower court was correct in holding laches did not bar the veteran's claim.

ARGUMENT.

I.

State Statutes of Limitation Do Not Apply to an Action for Reinstatement, With or Without Damages Incidental to Refusal to Reinstate, Because It Is Exclusively Equitable.

Basic in the function of this Act is the reinstatement of the veteran in his proper position with his former employer. This function can only be carried out through decrees wholly equitable in nature. *Holmberg v. Armbrecht,* 327 U. S. 392, determined that State statutes of limitation do not apply to such actions.

The principal aim of the law is the protection of the veteran's employment to insure a smooth transition from military to civilian life. So it was considered while under discussion in Congress,[1] and so it has uniformly been interpreted by the courts. Thus, the employment opportunities and privileges afforded the veteran must equal those of employees who progressed through remaining behind. (*Fishgold v. Sullivan Corp.,* 328 U. S. 275 (1946); *Oakley v. L. & N. R. R. Co.,* 338 U. S. 278 (1949); *Droste v. Nash-Kelvinator Corp.,* 64 Fed. Supp. 716 (E. D. Mich. 1946); *Kephart v. United States,* 74 Fed. Supp. 578 (C. Cls. 1947), motion for new trial refused, 75 Fed. Supp. 1020 (C. Cls. 1948).) The Act has a dual purpose, to enable the demobilized veteran to regain his lost skill by its actual use on the job, as well as to provide

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[1]See comments of two outstanding supporters of the legislation, Representatives Van Zandt and O'Toole, 86 Cong. Rec. 10, 346 and 10,445, respectively.

him a stabilized income during the period of readjustment; thus damages alone are not adequate where reinstatement is desired. (*Dacey v. Bethlehem Steel Co.,* 66 Fed. Supp. 161 (D. Mass. 1946); *Kay v. General Cable Corp.,* 59 Fed. Supp. 358 (D. N. J. 1945); *Hall v. Union Light, Heat & Power Co.,* 33 Fed. Supp. 817 (E. D. Ky. 1944); *Byrd v. North American Aviation, Inc.* (S. D. Calif., 4/23/48, 6/29/48); *King v. Southwestern Greyhound Lines, Inc.* (W. D. Okla, 3/29/48).) As the Court said in *John S. Doane Co. v. Martin,* 164 F. 2d 537, 540 (C. A. 1, 1947): "And the offer of a year's salary without working would not accord to the veteran the opportunity to reacquire skills and business habits which appears to be the purpose of the Act." So paramount is the right of restoration that it has been questioned whether the veteran could maintain an action for damages alone where he was restored belatedly or at too low a rate, or where he desired to retain substitute employment he had found.[2] The remedial provision itself, Section 8(e) of the Act, is primarily concerned with power of the courts to compel the employer "to comply with such

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[2]*Feore v. North Shore Bus Co., Inc.,* 68 Fed. Supp. 1014 (E. D. N. Y., 1946), reversed on other grounds, 161 F. 2d 552 (C. A. 2, 1947); *Hall v. Union Light, Heat & Power Co.,* 54 Fed. Supp. 817 (E. D. Ky., 1944); *Kent v. Todd Houston Shipbuilding Corp.,* 72 Fed. Supp. 506 (S. D. Texas, 1947); *Kincinski v. Constable Hook Shipyard, Inc.,* 1 Na. Ca. 63707 (D. N. J., 2/26/47); reversed on other grounds 168 F. 2d 404 (C. A. 3, 1948); *Guinther v. Scala,* 11 Na. Ca. 63380 (D. N. J., 9/18/46); *Shine v. Air Associates, Inc.* (D. N. J., 4/10/47); *Miller v. Combustion Engineering Co., Inc.,* 73 Fed. Supp. 359 (E. D. Tenn., 2/1/47), affirmed 165 F. 2d 372 (C. A. 6, 1948).

provisions," and speaks of damages only "as an incident" of this obligation.[3]

Only by working in their former positions can veterans have the opportunity to regain and use their previous abilities and experience in a familiar invironment; only thus can they retain their seniority standing, receive the statutory seniority credit for their time in military service, enjoy statutory protection from discharge without cause, and participate in insurance and other benefits in a manner which reflects their pre-war and wartime continuance in the same employment. Here, Sanger could not make use of his long familiarity with and knowledge of appellant's tools and his conviction that they were good unless he were returned to his position as salesman for appellant. As he said, "I just don't seem to be able to put up enough sales resistance or to show reason enough why they (his former customers) should discontinue Plomb, because I was sold on Plomb myself and I still think it is the best tool manufactured." [R. 104.] In addition, it is only in his former sales territory that Sanger can enjoy the benefits of his previous acquaintance and friendship with customers and employ his understanding of their needs and wants. Unless Sanger, or any other veteran, is restored to work in a position in which he retains these advantages, the statutory object is defeated.

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[3]The award of damages as an incident or a part of equitable relief does not, of course, change the character of a proceeding of purely equitable cognizance. Pomeroy, *Equity Jurisprudence*, 5th Ed., Sec. 237e; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48, 49 (1936); *Walling v. O'Grady*, 146 F. 2d 422 (C. A. 3, 1944). See also *Feore v. North Shore Bus. Co.*, 161 F. 2d 552 (C. A. 2, 1947).

If the veteran demands reinstatement as he does here, so he can enjoy these advantages, it is obvious that a mere award of damages is insufficient and that an order requiring the employer to meet the statutory obligation to reinstate is necessary. Such order would necessarily specify, with great detail and precision, what affirmative action the employer must take to comply with the Act; it would embrace such matters as the rate of compensation and the method of its computation,[4] the correction of seniority rosters with dates or roster position set forth,[5] the place and conditions of employment,[6] the responsibility and duties to be allocated to the veteran[7]—in fact the scope of orders in reemployment cases is bounded only by the variety of elements in a "position" over which a dispute might arise. The order here was of this kind. It spelled out exactly what Sanger's territory would be, what his rate of compensation would be and how it would be computed, and what Sanger would have to do in return; it enjoined appellant from discharging Sanger without cause within a year. And to clinch the relief and assure

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[4]*Levine v. Berman,* 161 F. 2d 386 (C. A. 7, 1947), cert. den. 332 U. S. 792 (1947); *Whitver v. Aalfs-Baker Mfg. Co.,* 67 Fed. Supp. 524 (N. D. Iowa, 1946).

[5]*Conner v. Pennsylvania R. R. Co.,* 177 F. 2d 854 (C. A., D. C., 1949), cert. den. 339 U. S. 919 (1950); *Chesapeake and Ohio Ry. Co. v. Morris,* 171 F. 2d 579 (C. A. 7, 1948), cert. den. 336 U. S. 967 (1949).

[6]*Loeb v. Kiro,* 169 F. 2d 346 (C. A. 2, 1948); cert. den. 335 U. S. 891 (1948); *Salter v. Becker Roofing Co.,* 65 Fed. Supp. 633 (M. D. Ala., 1946).

[7]*Parker v. Maynard Boyce, Inc.,* 74 Fed. Supp. 581 (S. D. Cal., 1946); *Troy v. Mohawk Shop, Inc.,* 67 Fed. Supp. 721 (M. D. Pa., 1946); *Van Doren v. Van Doren Laundry Service,* 68 Fed. Supp. 938 (D. N. J., 1946), affirmed in part and reversed in part 162 F. 2d 1007 (C. A. 3, 1947).

full compliance, the court retained jurisdiction over the parties. [R. 20, 21.][8] Suits in which relief of this type is required are, beyond argument, equitable in nature. (Pomeroy, *Equity Jurisprudence* (5th Ed.), Sec. 138, 170-171.)[9]

Because the veteran's action here is cognizable solely in equity, the Federal Rules of Decision Act, 28 U. S. C., Section 1652, does not require the court to follow state statutes of limitation, and the usual equitable limit of "reasonable time" applies. (*Holmberg v. Armbrecht,* 327 U. S. 392.)[10] In the words of the Supreme Court, the principles are as follows (327 U. S. 395):

> "The present case concerns not only a federally created right but a federal right for which the whole

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[8]Jurisdiction was retained under this Act in *Hoyer v. United Dressed Beef Co., Inc.,* 67 Fed. Supp. 730 (S. D. Calif., 1946); *Armstrong v. Tennessee Coal, Iron and R. Co.,* 73 Fed. Supp. 329 (N. D. Ala., 1947); *Delaney v. Special Service Co., Inc.,* 76 Fed. Supp. 414 (E. D. La., 1948); *King v. Southwestern Greyhound Lines, Inc.,* unreported (W. D. Okla., 3/29/49), on remand; *Sunker v. Local No. 261,* unreported (E. D. Tenn., 1949).

[9]*Walsh v. Chicago Bridge and Iron Co.,* 90 Fed. Supp. 322 (N. D. Ill., 1949), cited contra by appellant, was an action for damages, and equitable relief was not involved. Even as to damages alone, however, there is some indication that the action in reemployment cases is equitable rather than legal; damages ordinarily are allowable or not according to fixed rules of law rather than the discretion of the court, and the court must follow the proofs, judging credibility as a jury would; yet it has been held that under the Act the award of damages is discretionary with the court, apparently because of its close dependency upon other questions in which discretion must be exercised. *Bentubo v. Boston and Maine R. R.,* 160 F. 2d 326 (C. A. 1, 1947); *Levine v. Berman,* 178 F. 2d 440 (C. A. 7, 1949), cert. den. 339 U. S. 982.

[10]Appellant's argument to the contrary seems to be based on the rather serious misconception that the Act provides only a year's employment or a year's wages in lieu thereof (Br. 68). If this were true, appellant perhaps would be correct in its contention that State statutes of limitation apply, since the action could in all cases

remedy is in equity. * * * And so we have the reverse of the situation in Guaranty Trust Co. v. York, *supra*. [326 U. S. 99.] We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.

"*Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief.* Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. * * *"

"Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that

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be determined by an award of damages and its character might not be solely equitable. But appellant's view of the Act is untenable since the decision in *Oakley v. Louisville and N. R. Co.*, 338 U. S. 278 (1949), in which the Supreme Court held the protection of the Act in many respects was not limited to the first year of reemployment, and that the Act did not establish a one-year statute of limitations on veteran's claims. See also *Sunker v. Local 621* (unreported) (E. D. Tenn., 10/3/49), ordering restoration in addition to interim damages, on the ground that the veteran is entitled to the opportunity of being continued in employment even in an elective position beyond the year in which he may not be discharged without cause; and *O'Connor v. Yardley Golf Club,* 16 Labor Cases Par. 64,892 (E. D. Pa., 1948), affd. 171 F. 2d 40 (C. A. 3, 1948), reaching a similar result on an annual contract of employment.

'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded *upon some change* in the condition or relations *of the property or the parties.* Galliher v. Caldwell, 145 U. S. 368, 373; see Southern Pacific Co. v. Bogert, 250 U. S. 483, 488-89. *And so a suit in equity may lie though a comparable cause of action at law would be barred.* If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time." (Emphasis added.)

Holmberg v. Ambrecht rules this case.[11]

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[11]Appellant cites the minor change made in 1948 in phraseology of the Rules of Decision Act to show that Act makes State statutes of limitation apply to causes exclusively equitable in nature. The change is irrevelant to this issue. The change was in the provision "The laws of the several States * * * shall be regarded as rules of decision in *trials at common law*, in the courts of the United States, in cases where they apply" (28 U. S. C., Sec. 725); in 1948 "civil actions" was substituted for "trials at common law" (28 U. S. C., Sec. 1652). The phrase defining the cases to which State laws apply is, of course, "cases where they apply" and not "civil actions" or "trials at common law." The change did not affect in any way "the cases where (State laws) apply." As the reporter's note indicated (Title 28, U. S. Code Congressional Service, 80th Cong., 2nd Sess., p. 1868), the change merely conformed the statute to the Federal Rules of Civil Procedure, which established *"one form"* of action. (Rule 2.) The reporter's statement that the Rules of Decision Act "has been held to apply to suits in equity" merely took into account cases like *Cope v. Anderson,* 331 U. S. 461, where the basis of the action, unlike that in *Holmberg v. Ambrecht,* was legal and equity jurisdiction was only concurrent, being based on "the scope of the relief sought and the multitude of parties." (331 U. S. at 463-464.) If, as appellant argues, the new phrase "civil actions" introduced in 1948 made a genuinely substantive change, it is difficult to see how there are now any "cases where (State laws) apply," because the new single form of federal actions was theretofore unknown.

No reason exists here for applying State rules in Federal courts; rather the reverse. Where Federal courts have jurisdiction, either of legal or equitable causes, only by diversity of citizenship and the cause is of State origin, they sit as "only another court of the State" and so should apply the local rules. (*Guaranty Trust Co. v. York,* 326 U. S. 99, 109.) Likewise, in actions basically legal in character, whether legal in form or equitable because of formal considerations such as scope of relief or multiplicity of parties (see *Cope v. Anderson,* note 11 of this brief), State rules properly apply because the court is not called on to exercise discretion or other equitable powers in determining the issue. Neither of these is the case here. The Rules of Decision Act exempts from State rules cases "where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." By this clause, State laws are inapplicable where they conflict with the policy of a Federal statute. (*Connecticut Mutual Life Ins. Co. v. Schaefer,* 94 U. S. 457 (action on insurance policy under diversity jurisdiction, confidential communication not protected by State statute but not within express exceptions of Federal statute).) And the creation of a special Federal remedy shows a Federal policy as to which State laws cannot control. (*Byron Jackson Co. v. United States,* 35 Fed. Supp. 665 (S. D. Cal. 1940).) This was an action by a vendor against the United States as vendee under the Tucker Act, in which Judge Yankwich held a state policy against liquidated damages inapplicable; the court's holding was (35 Fed. Supp. at 667-668):

> "* * * the application of state or federal principles of law to the interpretation of such contracts is dependent upon the source of the rights to be interpreted and the courts in which enforcement is sought.

"Grant that if the Government resorted to a state court to enforce its rights, or was sued therein, its rights might be governed by State rule.

"But when the right to sue the Government on a contract is confined to its own courts, we have clearly a right arising under the laws of the United States, as to which state rules are inapplicable. See Board of Commissioners v. United States, 1939, 308 U. S. 343, 349, 350, 60 S. Ct. 285, 84 L. Ed. 313; Deitrick v. Greaney, 1940, 309 U. S. 190, 200, 60 S. Ct. 480, 84 L. Ed. 864."

The nature of the remedy given veterans under the reemployment statutes is unique, and has peculiarly Federal characteristics which eliminate the usual reasons for applying State rules of decision. As has aptly been said, the veteran's action is *"sui generis."* (*Missouri-K. & T. R. Co. v. Deavers,* 171 F. 2d 961, 962 (C. C. A. 5, 1950).) The need for national uniformity in rights under a law of this type dictates rejection of State statutes of limitation.

The veteran is permitted to sue in Federal courts without costs; he is given a specific right of representation by the United States Attorney in litigation; his case is to be accelerated on the court calendar; the Federal courts are given specific jurisdiction; and the usual jurisdictional amount in diversity cases (the principal category of suit in which State rules apply) is missing. In conferring these special advantages on veterans, Congress emphasized the divorcement of reemployment suits from State law, for Congress lacks power to confer them in State courts. Congress also thereby evinced a unique solicitude for the individual veteran, and indicated a policy of concern for each individual case on its own merits. On this account,

the equitable criterion of "reasonable time" is proper, and not the inflexible rules of statutes of limitation. Such result is but another facet of the "liberal construction" of the Act required by *Fishgold v. Sullivan Corp.,* 328 U. S. 275, 285.

II.

The Finding of the Trial Court That Laches Does Not Exist in This Case Should Be Sustained.

Whether *laches* exists and, if so, to what extent it should bar the relief sought, depends upon the discretion of the court of equity. In the exercise of such discretion, the court below found that *laches* did not exist, that defendant contributed to such delay as occurred, and that the delay did not prejudice defendant in any way. These findings should not be disturbed if there are any reasonable grounds for them.

Laches as a doctrine is stated, somewhat incompletely, in the maxim, "Equity will not aid one who has slept on his rights." There are two reasons for this: First, a court of equity will not adjudicate a case in which a sound determination cannot be made because evidence has been lost by unreasonable delay; and second, a court of equity will not perpetuate an inequity which an unreasonable delay might cause. This latter basis for *laches* does not exist unless the delay, besides being unreasonable, has prevented the other party from taking action by which he could protect his interests, has led him to take action which would make the relief sought burdensome or oppressive, or has otherwise prejudiced him. (*Russell v.*

Todd, 309 U. S. 280;[12] *Coon v. Liebmann Breweries Inc.,* 86 Fed. Supp. 333 (D. N. J. 1949).) Appellant contends that this is what occurred here.

If the delay was not unreasonable, the question of prejudice by it does not arise. The trial court determined

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[12]"From the beginning, equity, in the absence of any statute of limitations made applicable to equity suits, has provided its own rule of limitations through the doctrine of laches, the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant. Wagner v. Baird, 7 How. 243, 258; Stearns v. Page. 7 How. 819, 828, 829; Philippi v. Phillippe, 115 U. S. 151, 157; United States v. Beebe, 127 U. S. 338; Curtner v. United States, 149 U. S. 662, 676; Alsop v. Riker, 155 U. S. 448, 460; Abraham v. Ordway, 158 U. S. 416, 420. In the application of the doctrine of laches it recognized that prejudice may arise from delay alone, so prolonged that in the normal course of events *evidence is lost or obscured;* and the English Court of Chancery early adopted the rule, followed in the federal courts, that suits to assert equitable interests in real estate will, without more, be barred after the lapse of twenty years, when ejectment or the right of entry for the assertion of a comparable legal interest in the land would be barred. Elmendorf v. Taylor, 10 Wheat. 152, 173; Hovenden v. Lord Annesly, 2 Sch. & Lef. 607. And where resort was had to equity *in aid of a legal right,* equity, following the law, would refuse its aid if the legal right had been barred by the applicable statute of limitations. *Carrol v. Green,* 92 U. S. 509; *Godden v. Kimmell,* 99 U. S. 201, 210; *Wood v. Carpenter,* 101 U. S. 135; *Philippi v. Philippe, supra; McDonald v. Thompson, supra;* Pomeroy, *Equity Jurisprudence* (4th Ed.), Sec. 1441, and cases cited.

* * * * * * * *

"But federal courts of equity have not always held themselves bound to follow local statutes which in ordinary circumstances they could adopt and apply by analogy. In each case the refusal has been placed upon the ground of special equitable doctrines, *making it inequitable* to apply the statute. Laches may bar equitable remedy before the local statute has run. * * * (Citing cases) * * * On the other hand, time has been held to be no bar to an equitable suit for a trustee's accounting * * * (Citing cases) * * *. Federal courts of equity have not considered themselves obligated to apply local statutes of limitations *when they conflict with equitable principles,* as where they apply, irrespective of the plaintiff's ignorance of his rights because of the fraud or inequitable conduct of the defendant. * * * (Citing cases) * * *." (Emphasis added.) *Russell v. Todd,* 309 U. S. at 287-288.

that the veteran had not delayed unreasonably in bringing his action following appellant's refusal to restore him to his former position. What is "unreasonable" can only be determined by an exercise of the trial court's discretion after consideration of all of the facts placed in the context of the situation and State statutes of limitation are not necessarily a guide. (*Holmberg v. Armbrecht,* 327 U. S. 392.) Such exercise of discretion here is amply supported by the evidence, and so is beyond the scope of review on appeal.

A. There Was No Unreasonable Delay in 1946.

The evidence shows that in January, 1946, appellant refused to give Sanger his former position which he had requested, and made a counter-offer of two different positions. [Stipulation, Ex. 50, par. 10.] Sanger was not able to agree immediately to the counter-proposals, requested and was given "time to think it over" and it was agreed that he "subsequently might come back with a proposition." [R. 131, 151.] Correspondence ensued on these matters. [R. 64, 65, 66, Exs. 25, 26, 31.] In March, 1946, Sanger met with Kerr, appellant's general sales manager, repeated his desire for his old job and received substantially the same counter-offers. [R. 132.] Sanger stated he would have to seek government assistance in getting his old job if appellant would not grant his request voluntarily. [R. 133.] Kerr told him appellant's president "was still of the same opinion" but that he, Kerr, would let Sanger "hear from him when he got back to California." [R. 66.] Within the month, Sanger consulted Selective Service officials concerning his re-employment rights. [Stipulation, Ex. 50, par. 11.]

From these facts, it is clear that the parties were negotiating up through March, 1946, and that Sanger at that time was led to expect some further word from appellant concerning his reemployment. A delay of several weeks at this point to give appellant time to respond certainly cannot be termed unreasonable, especially as Sanger's reinstatement raised problems of retaining other employees. [R. 129.] In this situation, the employer is entitled under the Act to a reasonable time to reach a decision and to make the personnel adjustments entailed in reinstating a veteran. (*Donaldson v. Tennessee Coal, I. & R. Co.,* 68 Fed. Supp. 681 (N. D. Ala., 1946).) Sanger would have had no claim for damages from such delay had he brought this action at the expiration of such reasonable period, say, in June, 1946. Up to this point, Sanger's delay was entirely reasonable; in fact, it seems somewhat doubtful that he could have sued for reinstatement successfully prior to this time, because his status was still being negotiated and he had not been told his claim was finally rejected, though appellant had reached that decision. [R. 142, 155.] Furthermore, the delay up to this time was occasioned by appellant's own actions, and so bars it from asserting *laches* as a defense for damages for this period. (*Special Service, Inc. v. Delaney,* 172 F. 2d 16 (C. A. 5, 1949); *Hayes v. Boston & Maine R. R.,* 66 Fed. Supp. 371 (D. Mass. 19), affirmed 160 F. 2d 325 (C. A. 1, 19); *Byrd v. North American Aviation Co.,* 15 Labor Cases, par. 64, 614 (S. D. Cal. 1948); *DeGalliford v. Watkins Motor Lines* (unrep., D. Ga. 1947), affirmed 167 F. 2d 274 (C. A. 5, 1948).)

The substance of Sanger's conference with Selective Service officials in March, 1946, does not appear. Nonetheless, it is a reasonable inference that he sought advice

and information concerning his rights under the Act, and what Selective Service might do to help him. A prudent man would ascertain this as background for the expected further negotiations with the employer. It is unlikely that Sanger then asked Selective Service officials to intervene, for he was then expecting further word from appellant.

Next in order of events shown by the record is conferences and correspondence by Selective Service with appellant concerning Sanger's position. This began in August, 1946, and continued through October, 1946. [Stipulation, Ex. 50, par. 13.] At most, this shows inaction for only about two months, June and July, 1946. But the inference can readily be made that this period was consumed in investigation and examination of Sanger's case. Indeed, the inference is so strong as to amount almost to a fact; a much longer period for this activity would have been entirely reasonable, as a brief description of the government's procedure in assisting veterans under the Act will show.

By Section 8(g) of the Act, the Director of Selective Service was required "to render aid in the replacement in their former positions of persons" entitled to the benefits of the Act. This function was transferred to the Secretary of Labor by Public Law 26, 80th Congress, March 31, 1947. This function is one of advice, mediation and a search for amicable adjustment if possible; the primary object of the statute is to place the veteran in his job permanently as a means of reabsorbing him into civilian life. Unadjusted differences with the employer, coercion, litigation, all tend to cause bitterness between the employer and employee which may quickly terminate the relation and defeat the object of the statute.

Even after the case is transferred to the United States Attorney for possible litigation under Section 8(e), the Act requires him to attempt "the amicable adjustment of the claim." In assisting veterans, the first step for Selective Service (or the Department of Labor) is to collect the facts and such evidence as is available to substantiate them; next, an opinion must be formed as to the legal merits and possibilities in the case. In a case like Sanger's where many issues exist and some of them are complex, this obviously takes considerable time if the job is to be done properly. Then, if the case appears valid, representations are made to the employer and negotiations are undertaken. In the course of these, disputes often arise concerning the facts or legal issues, and they must be resolved if possible. Compromises on various points by both parties may be offered, and overall-solutions must sometimes be recommended. The general nature of these proceedings is properly an object of judicial notice.[13] The inferences drawn therefrom by the trial court in reaching his conclusion that there had been no unreasonable delay were almost inescapable and were well within the historical discretion of courts of equity and trial courts on this subject. This accounts for the period through October, 1946,

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[13]*United States v. Certain Lands in Douglas County,* 55 Fed. Supp. 924, 925 (W. D. Wis., 1944); executive creation of Labor Board of Review and appointment of personnel; *Ackman v. North State Contracting Co.,* 110 F. 2d 774, 777 (C. A. 6, 1940); careful choice of Selective Service Board members and their sound and sympathetic judgment in selecting inductees. *U. S. ex rel. Beers v. Selective Training and Service Local Board,* 50 Fed. Supp. 39, 40 (W. D. Wis., 1943).

when Selective Service terminated its intervention as hopeless. [Stipulation, Ex. 50, par. 13.]

Sometime thereafter, apparently shortly, Selective Service informed Sanger of the outcome. [Stipulation, Ex. 50, par. 13.] At this point, the usual procedure is to advise the veteran of his right to representation by the United States Attorney and to request him to indicate whether the file should be forwarded to the United States Attorney or returned to the veteran. In this case, the file was transferred from Los Angeles to the United States Attorney in Chicago [R. 14], a much more convenient forum for the veteran, whose employment was nearby. Section 8(e) of the Act obliges the United States Attorney to represent the veteran only if he is "reasonably satisfied" his claim is valid; it is thus necessary for the United States Attorney to make his own determination as to the evidence and legal issues before bringing suit. It would be most extraordinary that these actions could all have been completed and suit filed within the two months November-December, 1946. Here again, there was no abuse of discretion by the court below in drawing such inferences as led it to conclude there was no unreasonable delay.

Thus is the entire year 1946 accounted, with sufficient evidence not merely to support the trial court's exercise of discretion but to make a finding of unreasonable delay in 1946 amount almost to an abuse of discretion. Appellant claims the delay in bringing action prejudiced it financially, in that the award of damages requires it in effect

to pay two commissions on the 1946 sales in Sanger's old territory; there is no other claim of prejudice.[14] (Br. 37.) Damages were awarded only for the year 1946; later periods were excluded and Sanger does not contest this exclusion. Such delays in bringing action as occurred after 1946 are irrelevant because they could not have prejudiced appellant during 1946. Since there was no unreasonable delay in 1946, the trial court's finding that no *laches* existed here is proper, nay, unavoidable.

B. Veteran's Claims Are Not Barred by Laches Where the Delay Is in the Government's Action in Assisting the Veterans.

Appellant contends that the delays in 1947 and 1948 amounted to *laches* and bar the veteran's claim. It asserts the delays were due to Sanger's lack of interest in reclaiming his position with appellant because his earnings from other sources were high in those years; it concludes that this delay bars the entire action. Appellants cite nothing, and we have been able to find nothing, in the record to sustain the conjectured reason for the delays. The United States Attorney in Chicago returned the file to the veteran in February, 1948, with a refusal to represent him. [R. 14.] Since Selective Service advised the veteran of its failure to amicably adjust his claim sometime during or after October, 1946 [R. 14], the longest

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[14]Yet appellant urges that Sanger's entire action, including his claim to reinstatement, is barred by laches [R. 11]. In the absence of loss of evidence, not claimed, any delay could not have prejudiced appellant in reinstating Sanger. If an unreasonable delay has occurred, the proper action is to undo the prejudice caused by the delay, *i.e.*, to limit damages to periods outside the delay, rather than to adopt the inequitable penalty of dismissing the entire action. See *Dacey v. Bethlehem Steel Co.*, 66 Fed. Supp. 161 (D. Mass., 1946).

period the United States Attorney could have held the file would be November, 1946, to February, 1948.

Delays resulting from inaction of the government officials in performance of their statutory duty to aid veterans are not the responsibility of the veteran and cannot give rise to laches.[15] *Hayes v. Boston & Maine R. R.*, 66 Fed. Supp. 371 (D. Mass., 1946), affirmed 160 F. 2d 325 (C. A. 1, 19....); *Coon v. Liebmann Breweries, Inc.*, 86 Fed. Supp. 333 (D. N. J., 1949); *cf. Juelich v. Syracuse Baseball Club, Inc.*, 15 Labor Cases No. 64,689 (N. D. N. Y., 1948), where the court excused delay on the ground of the veteran's ignorance of the law and procedure, and excused delays connected with consulting private counsel.[16] Where government action is involved, delays may occur without fault and with due diligence of all concerned, just as they may in court proceedings once the action is begun. In March, 1947, the Selective Service System was terminated, the Office of Selective Service Records was established, and the function of assisting veterans in obtaining reemployment was transferred to the Department of Labor. Public Law 26, 80th Congress, March 31, 1947, 60 Stat. 31. Files of all case then pending with Selective Service were transferred at the same time, and it is possible that Sanger's file was among these. Not until July 30, 1947, were funds appropriated to the Department of Labor for performing this work. Public Law 271, 80th

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[15]*N. L. R. B. v. Sun-Tent Luebbert Co.*, 151 F. 2d 483, 488 (C. A. 9, 1945); *N. L. R. B. v. Andrew Jergens Co.*, 175 F. 2d 130, 134 (C. A. 9, 1949); *Fleming v. Tidewater Optical Co., Inc.*, 35 Fed. Supp. 1015, 1017 (E. D. Va., 1940).

[16]In *Noble v. International Nickel Co.*, 77 Fed. Supp. 352 (S. D. W. Va., 1948), cited by appellant to the contrary, the veteran consulted the wrong government agency and left his case there 20 months without following it up.

Cong. 61 Stat. 610, 617. Following this appropriation, field offices were set up and staffed, and work was begun on the pending cases. They were referred to United States Attorneys as quickly as possible, but in many cases it was necessary to ascertain the veteran's wishes, and examine the file in order to advise the United States Attorney of the Department of Labor's views on the legal aspects of the case. Such advice is nearly always sought by the United States Attorney, and is often essential to him. The United States Attorneys are generally burdened with a wide variety of cases in which government interests are involved, ranging from land condemnation to transportation of stolen autos; the problem of veterans reemployment are complex and the more than 400 cases[17] interpreting the Act require a great deal of study and research; thus it is unavoidable that the United States Attorney should depend to a great extent on the advice of the specialists who administer the law from day-to-day. In this situation, it is apparent that substantial delays in disposing of Sanger's case, either by Selective Service or its successor, or by the United States Attorney were to be expected. It is wholly conjectural that the abandonment of public channels in favor of private counsel would speed up the action; in this case, it did not do so.

Such delays are a necessary concomitant of government participation in proceedings of this kind. Diligence cannot eliminate them. Any delay in the period November 1946-February 1948, when the United States Attorney may have held Sanger's case, was reasonable in light of the above

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[17]Some 250 of the decisions are digested in the *Interpretative Bulletin and Legal Guide, Veterans' Reemployment Rights,* U. S. Dept. of Labor, January 1948, and Supplement thereto, July, 1948.

events. Delays of approximately the length of this were held no bar to the action in *Coon v. Liebmann Breweries, Inc.,* 86 Fed. Supp. 333 (D. N. J., 1949) and *Byrd v. North American Aviation Co.,* 15 Labor Cases, No. 64,614, 22 (S. D. Cal., 1948).[18]

Laches is a defense arising out of personal fault, "lack of reasonable diligence" of a party which makes it inequitable to grant the relief he seeks. (Pomeroy *Equity Jurisprudence* (5th Ed.), par. 419.) It is difficult to see how the veteran's diligence, or lack of it could affect the outcome here. He cannot control the diligence of the public officials concerned, even if their inattention is due to their own personal faults rather than to requirements of other duties, turnover in personnel, and the like. Ordinary rules of agency do not govern the application of equitable defenses, and the essential element of personal fault on the part of the veteran is missing. To charge him with the delays of public officials, almost certain to occur, would make him act at his peril in electing the remedy Congress specifically provided for him. It would force him to surrender, at any uncontrollable interruption

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[18]Reemployment cases appellant cites on his issue have little resemblance to the present case. In *Cummings v. Hubbell,* 76 Fed. Supp. 453 (W. D. Pa., 1948), the veteran did not request the assistance of government officials. In *Caldwell v. Harman,* 12 Labor Cases Par. 63,671 (S. D. Cal., 1947), the veteran was held not to have complied with statutory requirements in several respects, with delay being found, without discussion, an additional reason for denying relief. In *Daniels v. Barfield,* 77 Fed. Supp. 283 (E. D. Pa., 1948), the veteran did not protest his dismissal and made no demand for reinstatement, and the employer was unaware of the claim.

of the public official's attention to the case, the prestige and advantage of government backing. This result is intolerable under a remedial statute which must be "liberally construed" in the veteran's favor so as to carry out its purpose. (*Fishgold v. Sullivan Corp.*, 328 U. S. 275, 285.) At the very least, this result should not be reached without an affirmative showing, going beyond mere lapse of time, that in fact the delay was culpable.

Refusal to charge the veteran with delays of the government casts no excessive burden on the employer. He cannot claim surprise, for the veteran's application for reinstatement has put him on notice of the claim. He can stop his damages at any time by curing his default and complying with the Act. More important, the burden placed on the veteran by the employer's wrongful act is usually much greater than any burden the employer may bear; the veteran is nearly always wholly dependent on the job, much more so than the employer is dependent on the veteran or his replacement; Sanger's probable income from Plomb, his much smaller income when he was forced to rely on other lines, Plomb's sales figures, all show this. When burdens are considered, the equities all lie with the veteran. And finally, and decisive, Congress in making the facilities and prestige of the government available to the veteran cannot simultaneously have meant to penalize him on account of delays inherent in the form of assistance provided. This would nullify the very effect Congress was trying to achieve.

Conclusion.

The decision of the lower court that State statutes of limitation do not apply and that no laches, unreasonable delay, or prejudice by delay exists should be sustained.

Respectfully submitted,

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